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No. 08-712

In The
Supreme Court of the United States

JAMES HENRY McELROY,
Petitioner,

vs.

STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent objects to the Petitioners' Questions Presented on the ground that they assume certain procedural, legal, and factual premises that are demonstrably unfounded, as established more fully in this brief.

Respondent suggests instead the following Questions Presented:

1. Should the Court review Petitioner's claim that the state court improperly invoked *United States v. Ruiz*, 536 U.S. 622 (2002), to narrow application of *Brady v. Maryland*, 373 U.S. 83 (1963), where as a legal and factual matter, Petitioner has failed even to demonstrate a *Brady* violation?

2. Whether the prosecutor's failure to disclose certain evidence constituted a violation of *Brady*?

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Petitioner James Henry McElroy ("McElroy")[1] was properly convicted and sentenced in Harris County, Texas, for a brutal sexual assault to which he pled guilty and entered a judicial confession. In the instant petition for certiorari review of the state court's denial of *state* habeas relief, McElroy argues that he was unconstitutionally deprived of the protections of *Brady v. Maryland*, 373 U.S. 83 (1963), because the state court held that the protections described therein were waived after he pled guilty. Pet. Cert. at 6-14.[2] McElroy also argues that the state court improperly determined the evidence supporting his *Brady* claim was not material; and hence, that—even if *Brady* fully applied after McElroy entered his guilty plea—the state court erred when it held that there was no *Brady* violation. Pet. Cert. at 14-17.

However, and as will be established below, the Court should not address McElroy's broad constitutional claim under *United States v. Ruiz*, 536 U.S. 622 (2002), because even assuming *Brady*'s full applicability, McElroy fails to demonstrate a violation of *Brady*, in the present circumstance. Further, McElroy has a federal habeas petition pending in the United States District Court for the Southern District of Texas (Houston Division), which contains the very same issues presented here. Thus, certiorari review should be denied.

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[1] Respondent State of Texas will be referred to as "the State."

[2] Unless otherwise noted, all references to "Pet. Cert." and "Pet. Cert. App." are to the petition and appendix filed in No. 08-712.

JURISDICTION

The order of the Texas Court of Criminal Appeals, denying McElroy's state habeas application, was entered on October 8, 2008. The petition for writ of certiorari was filed on November 26, 2008. This Court has jurisdiction under the provisions of 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. Facts of the Crime

A. The victim's description of McElroy's sexual assault.

The evidence supporting the underlying conviction is based upon (i) T.S's[3] statement's to police, (ii) T.S.'s statements to a probation officer for preparation of a pre-sentence report ("PSR"), and (iii) McElroy's guilty plea and judicial confession. SHCR, at 42–50.[4] T.S. met McElroy in May of 2005, when she was watering her lawn and he stopped his motorcycle in front of her house. She next saw him in October 2005, when McElroy came to her house to ask her if she was selling her automobile. T.S. gave McElroy a piece of paper containing the names of both her and her husband, and her telephone number. Several days later, McElroy called T.S. and asked her to look outside her house so that he could "see her pretty

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[3] Although the victim's name is already part of the record on appeal, the State will refer to her by her initials, "T.S."

[4] "SHCR" refers to the clerk's record for McElroy's state habeas petition, specifically: *Ex parte McElroy*, No. 70,481-01, EventID 2340363. The "EventID" is located on the scanning cover sheet of each volume.

face." They spoke on the telephone about her automobile and other subjects before McElroy left. McElroy began calling T.S. more regularly to speak with her. By happenstance, T.S. next saw McElroy on November 5, 2005, at a bar, which she visited to meet another friend.

In the early morning hours of November 13, 2005, T.S. was awake at home. Her husband and son were asleep. She called McElroy earlier that night, and he called her at approximately 3 a.m., telling her that he was going to bring her and her husband a bottle of tequila because he was leaving town early the next morning. T.S. met McElroy outside of her house at approximately 3:20 a.m. McElroy told her that, since he had brought her something to drink, she should talk to him. McElroy grabbed her arm and told her to get into his truck. T.S. explained that she normally would not leave her house so late at night, but she had consumed a few drinks, and she trusted McElroy. McElroy told T.S. that he needed to go to a grocery store to purchase medicine for his girlfriend.

While driving, McElroy asked T.S. if she wanted to visit an old abandoned military property nearby where a "lot of bodies were buried." T.S. declined the offer. T.S. believed that McElroy would take her home after he finished his errand at the grocery store. However, when he returned from inside the store, McElroy became violent. McElroy drove to a darkened area, grabbed T.S.'s hair and pulled her down to his lap, forcing her to perform oral sex on him. McElroy removed T.S.'s dress, and shouted at her to "suck his penis." McElroy then pulled her head up by the hair and began twisting her nipples extremely hard, causing her pain. During the ordeal, McElroy held T.S. by her hair, with her head across the center console of the truck and her knees in the

passenger seat. McElroy inserted an unknown object into T.S's vagina, then attempted to penetrate her anus, but ceased this attempt because of T.S.'s screaming. During the sexual assault, McElroy threatened her with handcuffs. After approximately two hours, T.S. eventually broke free of McElroy's control, and attempted to get out of the truck through the driver's side window. McElroy opened the door to try to force her back into the truck and under his control. However, T.S. managed to escape, and ran to a neighbor's house to call the police.

The police arrived at the neighbor's home and observed T.S. wearing only a pink robe. They observed bruising on her left arm, above both of her breasts, and on the left side of her head. She was very upset and did not appear to be under the influence of drugs or alcohol.

B. McElroy's pleads guilty and then denies the sexual assault.

The only evidence supporting McElroy's version of events is (i) his guilty plea and judicial confession, and (ii) his statements to the probation officer—after his guilty plea—for preparation of the PSR. Importantly, McElroy's guilty plea and judicial confession are *consistent* with T.S.'s statements. In his written judicial confession, entered on May 12, 2006, McElroy swore under oath that:

> [O]n or about NOVEMBER 12, 2005, [McElroy] did then and there unlawfully, intentionally and knowingly cause the penetration of the mouth of [T.S.], hereinafter called the Complainant, by the sexual organ of the Defendant, without the consent of Complainant, namely the

> Defendant compelled the Complainant to submit and participate by the use of physical force and violence.

SHCR, at 258.

However, after entering his guilty plea, McElroy gave a statement to the probation officer for preparation of the PSR in which he denied the sexual assault, claiming that he found T.S. walking the streets early in the morning of November 12, 2005. SHCR, at 48–49. McElroy claimed that T.S. was in possession of a crack pipe, and he asked her if she needed a ride home. He claims that she got into his automobile. McElroy claimed that T.S. asked for money, and told him to take her to purchase drugs. McElroy contends that when he refused, she took off her clothes and jumped out of the truck. McElroy told the probation officer that he believed T.S. fabricated the accusation because she was afraid her husband would discover she was out late, and "needed an excuse."[5]

C. McElroy suggests the existence of an inconsistency, based upon the "false testimony" of T.S., where there is none.

McElroy's principle legal argument is grounded upon a highly dubious factual contention. McElroy suggests that T.S. made "false and misleading statements

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[5] McElroy's statement to the probation officer was largely consistent with his statement to police made prior to his initial arrest, accept that he added that he observed T.S. "toss something away" when he approached her in his automobile. SHCR, at 42–44, 47–48.

in the PSR." Pet. Cert. at 12. In an effort to support this assertion, McElroy cites a statement that T.S. made in an interview with the prosecutor. *Id.* at 16–17. The statement to the prosecutor was made after she made her statements to the police, but before her statements were given to the probation officer for preparation of the PSR. *Id.* at 11. These statements were described in two pages of handwritten notes taken by the prosecutor ("Notes").

However, T.S.'s statements to the prosecutor—as reflected in the Notes—do not *contradict* her statements made for the preparation of the PSR. The Notes reflect that the only information contained therein that was not ultimately part of the PSR was that T.S. "had a relationship with the petitioner that involved drugs." 2 RR 16–20; Pet. Cert. at 11. Despite McElroy's vague suggestions to the contrary, T.S. did *not* tell the prosecutor that she used drugs the night of the sexual assault, or that she asked McElroy to purchase drugs for her that night.[6]

Thus, at least two of the alleged "inconsistencies" between the Notes and T.S.'s other statements do not exist. Specifically, McElroy contends that: "Whether the complainant was smoking crack cocaine, and asked petitioner to take her to buy drugs was material to sentencing." Pet. Cert. at 17. While this argument is not unreasonable—at least in the abstract—the Notes do *not* support McElroy's allegations that the morning of the sexual assault, T.S. was smoking crack cocaine, or that

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[6] During the live hearing, habeas counsel repeatedly attempted to get the prosecutor to admit that T.S. told him she "smoked crack" on the night of the sexual assault, but the prosecutor stated she did not. 2 RR 16–20.

she asked him to purchase drugs. 2 RR 16–20. The "evidence" in support of this contention comes from McElroy's own statements, not from the Notes. *See* SHCR, at 43–44. Second, to the extent that the Notes suggested that T.S. voluntarily got into McElroy's car, T.S.'s testimony in the PSR confirmed this. SHCR, at 49–50.

Controlling here, McElroy cites no portion of the record suggesting that T.S. was ever directly asked about a relationship with McElroy that involved drug use, or that she ever *denied* this drug-relationship in response to any question.

II. Conviction and Procedural History.

McElroy was arrested and confined pursuant to a judgment and sentence of the 179th District Court of Harris County, Texas, in cause number 1047063. SHCR, at 270–71. McElroy pled guilty, and entered a judicial confession to the second-degree felony offense of sexual assault, for which he faced a sentencing range of no less than two-years and no more than twenty-years in prison. *Id.* at 258–65. The guilty plea was entered without a recommendation as to sentence, and in anticipation of the preparation of a PSR. *Id.* at 259.

After his voluntary and knowing guilty plea to this sexual assault, and after entering a judicial confession thereto, McElroy provided a statement as part of the PSR, in which he *denied* that he committed the sexual assault. SHCR, at 48–49. McElroy claimed that T.S. fabricated the entire story when he refused to purchase drugs for her. *Id.* On June 14, 2006, the trial court sentenced McElroy to ten-years in prison (the middle of

the sentencing range), no doubt due in some measure to McElroy's refusal to accept responsibility for his crime. McElroy did not appeal his conviction. SHCR, at 270–71; Pet. Cert. at 5.

On April 9, 2007, and with the assistance of counsel, McElroy filed a state application for the writ of habeas corpus with the Texas Court of Criminal Appeals. SHCR, at 2. The trial court conducted a contested, live, evidentiary hearing to consider McElroy's state habeas claims. After that hearing, the trial court entered written findings of fact and conclusions of law, and recommended that the state habeas application be denied. Pet. Cert. App A; SHCR, at 237–42. On October 8, 2008, the Texas Court of Criminal Appeals denied McElroy's state habeas application without written order, on the findings of the trial court with a hearing. SHCR, at cover.

REASONS FOR DENYING THE WRIT

I. The Questions Presented for Review Premature.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. *See* Sup. Ct. Rule 10. McElroy advances no special or important reason in this case, and none exists. Certiorari review of state habeas decisions is inappropriate where a claim is ripe for federal habeas review. As Justice Stevens once noted:

> [T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is

> supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J. concurring). Indeed, on November 20, 2008, McElroy filed a federal petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the same cleaims raised herein. *See McElroy v. Quarterman*, No. 4:08-CV-3446 (S.D. Tex.). Thus, it appears that "the more appropriate avenue" is now available for the litigation of the instant claims.

II. The Court Should Not Grant Certiorari to Review Because the Petitioner's Questions Presented are Barred by *Teague v. Lane*.

McElroy did not file a direct appeal of this conviction and sentence; hence, it became final thirty-days after the judgment and sentence were entered, *i.e.*, on August 14, 2006. *See* TEX. R. APP. P. 26.2 (a)(1) (defining the time to perfect an appeal). Thus, the State's interest in finality outweighs McElroy's interest in the retroactive application of any new rule of constitutional law. *Teague v. Lane*, 489 U.S. 288, 309–10 (1989) (plurality opinion); *see also Danforth v. Minnesota*, 128 S. Ct. 1029, 1040 (2008) (confirming that the principle in *Teague* regarding collateral review of a final state conviction still reflects prudential considerations like comity and finality).

McElroy cites no case of this Court extending *Brady* like obligations to the preparation of a PSR. While T.S. may have decided that she would not volunteer her participation in certain embarrassing and possibly criminal acts to the police or the probation officer (*i.e.*, her apparent drug use), McElroy has not demonstrated that she provided an affirmative misrepresentation of fact in response to any question. McElroy suggests that a prosecutor must provide evidence that might be used to impeach the material misstatements of a witness, where that witness has neither made such misstatements, nor been examined by either the prosecutor or the defense in a criminal proceeding. Because such an argument relies on the creation of a retroactive rule of constitutional law to be applied after a state conviction has become final, the Court should not grant certiorari on such a basis. *See* Section I, *supra*.

Because a grant of certiorari review in this Court would have the same impact upon the finality of McElroy's conviction and sentence, the Court is bound to consider the issues raised only in light of clearly established constitutional principles dictated by precedent as of August 14, 2006. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989). With this in mind, it is clear that McElroy's Petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

III. The Court Should Not Grant Certiorari to Review the Questions Presented Because They Involve Primarily Fact Intensive Questions of Evidence and State Sentencing Procedure.

As the State will establish in detail below, to reach McElroy's Questions Presented, the Court would first

have to review and reject certain state court determinations regarding both the admissibility of T.S.'s drug use at sentencing, and whether such evidence was mitigating—both determinations made under *state* evidentiary procedure.

In addition, as the State will establish in detail below, McElroy has failed to demonstrate that any non-disclosed evidence was "material" for purposes of *Brady v. Maryland*. Thus, even if the Court addressed McElroy's first issue, the *Brady* claim would ultimately be denied.

Finally—with respect to "materiality"—this Court will not ordinarily grant a petition for the writ of certiorari based upon a petitioner's assertion that a court misapplied a properly stated rule of law. SUP. CT. RULE 10; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) (Renquist, J.) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). Given the peculiar nature of this case, a review of "materiality" will have almost no application beyond McElroy. Materiality in this petition is not sufficiently important to warrant this Court's review.

IV. Whether or Not the State Court Actually Held that McElroy Waived his Right to Prospective *Brady* protections After He Entered His Guilty Plea, McElroy's Argument is Without Merit, Because He Was Not Entitled to *Brady* Protection in the Present Circumstance.

McElroy completely fails to state a claim in support of his *Brady* allegation. The Court in *Brady v. Maryland*,

held that the suppression by the prosecution of evidence favorable to an accused, after a request, violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87. This duty to provide favorable evidence also includes impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

The state's obligation to disclose favorable information extends only to information that is *material*. *See Bagley*, 473 U.S. at 674-75. "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . . ." *Id.* at 675 (footnote omitted); *cf.. Gray v. Netherland*, 518 U.S. 152, 168-70 (1996) (holding that a capital defendant was not entitled to creation of a "notice of evidence rule").

An earlier argument that the materiality test should be defined in terms of the defendant's ability to formulate defense strategies was explicitly rejected by the Court in *United States v. Agurs*, 427 U.S. 97 (1976). As the Court explained, to base the materiality requirement on the effect of the undisclosed information on a defendant's ability to prepare for trial would be unacceptable in part because such a standard would "necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense." *Id.* at 112 n.20. Because the state's duty extends only to exculpatory information, defining the materiality requirement in terms of defense strategies

would be at odds with the scope and purpose of the *Brady*

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-10. Instead, evidence is material "only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

A. McElroy cannot establish a *Brady* violation because he was already aware of the information contained in the Notes, and failed to utilize that information at sentencing.

Although not explicitly stated in his petition, McElroy suggests that the reason trial counsel did not raise T.S.'s drug use with the trial court (during sentencing), was that he was not aware of that information. *See* Pet. Cert. at 11 (where McElroy suggests that had the prosecutor turned over the Notes, trial counsel "would have made sure that the court knew about her statements prior to sentencing."). This suggestion is wholly contradicted by the record. Obviously, if T.S. used drugs in McElroy's presence, such information was necessarily known to McElroy. Indeed, we know that trial counsel relayed McElroy's complaint that T.S. was a "crack-head" prior to sentencing. *See* Pet. Cert. at 10 n.4 (suggesting that trial counsel told the prosecutor that McElroy considered T.S. a "crack-head" prior to the prosecutor's decision not to disclose the

Notes). Further, a cursory review of McElroy's statement to police would have put trial counsel on notice that McElroy claimed T.S. was using drugs the night of the sexual assault. *See* SHCR, at 43–44.

McElroy's essential complaint is *not* that he was unaware of the evidence suggesting T.S.'s drug use, but rather, that he did not know that the prosecutor knew of such evidence. But McElroy fails to establish materiality: he fails to provide any legal argument suggesting the prosecutor must provide documentary evidence, when the material basis of such evidence is already in the possession of the defendant; at least until a witness testifies in a manner in which the evidence could be used to impeach that witness.

McElroy's petition fails because trial counsel never made any effort to question T.S. about her drug use at sentencing. Stated differently, if T.S.'s drug use was so obviously mitigating, then why did trial counsel neglect to object to the PSR and expand the record at sentencing to include that drug use? Indeed, if trial counsel had objected to the PSR, claiming that it did not include evidence of T.S.'s drug use, then trial counsel could have moved the trial court to permit him to call T.S. as a witness, and examine her about her drug history with McElroy. *See Nguyen v. State*, 222 S.W.3d 537, 541 (Tex. App.–Houston [14th Dist.] 2007) (demonstrating that a defendant can object to a PSR if it fails to include all relevant sentencing information). Only if T.S. then *denied* that drug use, or testified in a manner inconsistent with the Notes, would the Notes have been admissible and would McElroy have been entitled to production of the Notes under *Brady*. *See* Tex. R. Evid. 613(c) ("A prior statement of a witness which is consistent

with the testimony of the witness is inadmissible except as provided in 801(e)(1)(B).").

McElroy's complaint would be better directed to the ineffective assistance of trial counsel for failing to pursue and develop T.S.'s drug use at sentencing. However, because McElroy never made this argument below, the Court should not now address it.[7]

B. Because McElroy apparently has never re-confirmed that he sexually assaulted T.S., he cannot demonstrate materiality.

After pleading guilty, McElroy gave a statement to the probation officer in which he completely contradicted both T.S., and the legal and factual basis of his guilty plea. SHCR, at 48–49. During the state habeas proceeding McElroy presumably had an opportunity to testify, and specifically to provide the state court with a *context* upon which to evaluate his *Brady* claim for materiality; which he failed to do. 1 RR 3. For instance, in the present petition, McElroy may be suggesting that T.S. is untruthful: McElroy may now concede that he sexually assaulted T.S., but that her brutal description of the rape should not be believed, because she did not independently volunteer her history of drug-use. Or perhaps McElroy now contends that T.S. took drugs the night of the sexual assault—a claim which the purported *Brady* material does not directly support—and that her

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[7] *Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("With very rare exceptions," the Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.").

drug use resulted in an exaggerated description of the attack.[8]

Under either conception, however, neither this Court nor the state court has a factual basis upon which to judge the materiality of the Notes. Because McElroy failed to describe the attack in the state habeas proceeding—and because he apparently has never *recanted* his later denial—the Court is forced to speculate about the specific manner in which T.S.'s drug related statements would have altered the likely sentence.

Stated differently, by failing to describe the circumstances of the sexual assault to which he pled guilty, McElroy is forcing the Court to speculate regarding the relationship between his ambiguous mitigation claim, and T.S.'s apparent drug use. Only where McElroy both concedes that he committed the crime, and provides a factual description of the events surrounding the rape, can a court determine the context in which T.S.'s drug use may have been relevant to mitigation. The State contends that consideration of such an argument—especially where the petitioner has denied that he committed a crime to which he has pled guilty—is not a appropriate use of the Court's scarce resources.

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[8] Although McElroy suggests that the evidence would have mitigated his sentence because T.S. was a "crack-head," *see* Pet. Cert. at 10 n.4, he does not directly adopt the highly dubious proposition that McElroy was morally deserving of a lesser sentence for a brutal sexual assault, merely because the victim was a drug user. Equally troubling is McElroy's suggestion that his relationship with T.S. was not "platonic," and that this information if disclosed to the trial court, would have somehow resulted in a lesser sentence for a brutal sexual assault. Pet. Cert. at 16–17.

C. McElroy has not established a *Brady* violation because he does not even suggest—let alone argue—that the evidence of T.S.'s drug use would have been admissible at sentencing.

The state court held that evidence of T.S.'s drug use was neither admissible nor material to sentencing. SHCR, at 240. It is crucial to place this legal determination into the context of McElroy's arguments below. Like the present petition, in his state habeas application McElroy failed to suggest anything but a vague relationship between the failure to disclose the Notes and his ultimate sentence. SHCR, at 14. Indeed, the state court apparently construed the bulk of McElroy's *Brady* argument as relating to his guilt. *See* SHCR, at 240 ("By pleading 'guilty,' a defendant waives his right to a contested trial, although the trial court might permit *evidence contesting guilt* in its discretion.") (emphasis added).

To reach McElroy's Questions Presented, the Court would first have to review and reject the state court determination regarding both the admissibility of T.S.'s drug use at sentencing, and whether such evidence was mitigating—both determinations made under *state* evidentiary procedure. McElroy fails even to acknowledge, much less address, the admissibility or relevance of the Notes under state procedure; rather, McElroy restates his ambiguous premise that the evidence was admissible to sentencing,[9] and that it was

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[9] Indeed the entirety of McElroy's argument regarding the state court determination that the evidence was inadmissable (continued...)

mitigating.[10] Thus, McElroy apparently asks the Court to reverse the state court determination regarding both admissibility and mitigating effect under state law, or to hold that such evidence is nevertheless material under the federal constitution, a doubtful proposition. *See Bagley*, 475 U.S. at 676 (requiring a reasonable probability that use of the evidence would result in an acquittal).

Indeed, McElroy's suggestion that *Brady* requires disclosure of irrelevant and inadmissible evidence has been already been rejected by the Court. *See Wood v. Bartholomew*, 516 U.S. 1, 6–7 (1995) (state's failure to disclose that witness had failed polygraph test did not deprive defendant of "material" evidence under *Brady*, in light of inadmissibility of polygraph results under Washington law, even for impeachment purposes).

In order for T.S.'s drug use—as that drug use is reflected in the Notes—to have been admissible to impeach T.S. at sentencing, McElroy would have to establish that he would have been permitted to ask T.S.

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[9](...continued)
appears to be the founded upon a single-sentence, and unsupported legal conclusion: "'Admissibility' is not an issue where the court assesses punishment on the basis of a PSR." Pet. Cert. at 15.

[10] The entirety of McElroy's argument addressing the state court determination that the evidence of drug use was not mitigating is another single-sentence, and an unsupported legal conclusion: "Judge Davie's conclusion that the undisclosed evidence was not mitigating is meaningless in view of the fact that she did not assess punishment." Pet. Cert. at 15. Bizarrely, McElroy's argument applies with equal vigor to this Court, and McElroy does not explain how the Court could reverse the state court mitigation determination where the Court did not itself "assess punishment."

about her drug use during sentencing.[11] McElroy simply fails to make this argument, except to ambiguously assert that the evidence was relevant to sentencing. And if T.S. had confirmed that drug use, McElroy would not have been permitted to introduce her previous statement contained in the Notes. *See* Tex. R. Evid. 613(c).

V. This Court Should Not Review an Ambiguous, Unpublished State Court Determination That Has No Precedential Value.

A. The State court determination regarding the application of *United States v. Ruiz*, to McElroy's *Brady* claim is ambiguous.

The state habeas court correctly noted that the Court's holding in *United States v. Ruiz*, did place limits upon *Brady v. Maryland*, at least where a petitioner attempts to challenge the basis of a guilty plea on a purported, antecedent *Brady* violation. SHCR, at 240. Indeed, the state habeas court apparently considered much of McElroy's *Brady* argument to be a challenge to his *guilt*, and not relevant to sentencing. *See* SHCR, at 240 ("By pleading 'guilty,' a defendant waives his right to a contested trial, although the trial court might permit *evidence contesting guilt* in its discretion.") (emphasis added).[12]

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[11] Of course T.S. never testified at sentencing, hence, this analysis presents the counter-factual consideration of non-events, which itself suggests the impropriety of granting certiorari.

[12] The State believes that the ambiguous nature of McElroy's *Brady* argument, especially where McElroy has denied that he committed the sexual assault, invites such interpretation.

While one might interpret the state habeas court's legal analysis to suggest a waiver of prospective *Brady* protection after a guilty plea, given the circumstances of the present case, such an interpretation is far from obvious. And as established below, because the state court provided an alternative legal rational to reject McElroy's *Brady* argument, the Court should deny certiorari.

B. The State court determination included an alternative basis to affirm McElroy's conviction.

During the state habeas proceeding, the trial court provided an alternative legal resolution, finding that McElroy failed to establish materiality because T.S.'s drug use was neither relevant or material to sentencing. SHCR, at 240–41. Further, the state court determined that any inconsistency between T.S.'s statements to police and to the probation officer were "apparent from a plain reading" of the PSR, and thus considered. *Id.*

Because the state court determination regarding materiality was correct, the Court should deny this petition for certiorari.

C. The Texas Court of Criminal Appeals' single sentence denial of McElroy's claim—which included an alternate basis to deny relief—is not important enough to warrant review.

The Texas Court of Criminal Appeals denied McElroy's *Brady* claim in a single sentence. SHCR, at cover. Although that denial referred to the findings of the

trial court, because the findings included two independent legal rationales, there is no reason to assume the Texas Court of Criminal Appeals adopted the trial court's apparent *Ruiz* interpretation. Indeed, the precedential value of such a denial is very limited because it does not reflect a reasoned opinion of the Texas Court of Criminal Appeals, and because it specifically *contradicts* a recent published opinion of the Texas Court of Criminal Appeals that rejects McElroy's interpretation of Texas law. *See Clark v. State*, 270 S.W.3d 573, 579 (Tex. Crim. App. 2008) (defendant who pleaded guilty to sexual assault of a child could assert *Brady* claim that prosecutor failed to disclose his knowledge of the falsity of an extraneous sexual misconduct offense alleged in presentence investigation report).

CONCLUSION

On the basis of the foregoing arguments and authorities, the petition for a writ of certiorari should be denied.

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